STATE OF MICHIGAN

COURT OF APPEALS

ANDREW BARRETT, Plaintiff-Appellant,	UNPUBLISHED February 10, 2011
v	No. 295342 Eaton Circuit Court
TAMARA ALLEN, Defendant-Appellee.	LC No. 09-000520-NO

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this premises liability case. Because the icy conditions of defendant's driveway were open and obvious and no special aspects existed, we affirm.

Plaintiff was employed as a tow truck driver. On January 5, 2008, plaintiff was dispatched to defendant's house at around 8:00 or 9:00 a.m. Defendant's father called because defendant's truck would not start. Defendant was not at her house at the time. According to plaintiff, the weather that day was clear, sunny, and cold, and the road conditions on the way to defendant's house were icy. When plaintiff arrived, he parked in front of defendant's driveway. He stated that the driveway was about 30 to 40 feet long, very steep, and covered with patches of ice. There was also snow on defendant's lawn. Plaintiff proceeded to walk up the middle of the driveway to meet defendant's father, who was at the top of the driveway. Plaintiff stated that he chose to walk up the middle of the driveway because he saw dirt along that path. When he reached the top of the driveway, plaintiff told defendant's father that he would not be able to get the tow truck up the driveway because of the icy conditions. However, plaintiff stated that he would still be able to tow the truck if they rolled it down the driveway into the street. As plaintiff attempted to walk down the same path that he had walked up, he slipped and fell, landing on his left shoulder. As a result of his fall, plaintiff suffered a broken shoulder blade and a torn rotator cuff.

Plaintiff argues that there was a question of fact that existed regarding whether he fell on black ice, that special aspects existed that would preclude granting summary disposition, and that there is factual support for a claim of gross negligence. A trial court's decision to grant summary disposition is reviewed de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73

(2006). Summary disposition of all or part of claim may be granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion for summary disposition, the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition." *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, this duty does not extend to dangers which are open and obvious. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329-328; 629 NW2d 573 (2004). Liability will only be imposed if special aspects exist that "differentiate the risk from typical open and obvious risks so as to create an unreasonable risk or harm." *Lugo*, 464 Mich at 517-518. An unreasonable risk of harm exists if the condition is "effectively unavoidable" or poses an "unreasonably high risk of severe harm." *Id.* at 218.

The test to determine whether a condition is open and obvious is whether an average person of reasonable intelligence would have been able to discover the danger upon casual inspection of the premises. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 350 (2002). It is an objective test and the inquiry is whether a reasonable person in plaintiff's position would have perceived the danger, not whether this particular plaintiff perceived it. *Corey v Davenport College* (*On Remand*), 251 Mich App 1, 5; 649 NW2d 392 (2002).

We conclude, after viewing the evidence in the light most favorable to plaintiff, that the condition was open and obvious without special aspects. Although the concept of "black ice" is inherently inconsistent with the open and obvious doctrine because it is invisible, *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), black ice may be open and obvious if there is evidence that the black ice was "visible upon casual inspection," or if there is "other indicia of a potentially hazardous condition." *Id.* The simple fact that plaintiff stated that the ice he slipped on was black ice or clear ice does not mean that the danger was not open and obvious. Plaintiff was called to defendant's house in early January. He stated that the weather was clear, but that it was cold, as would be expected in January. Also, he testified that the road conditions were slippery that day, and that when he arrived at defendant's house he noticed that the road in front of defendant's driveway was icy, as was defendant's driveway. He also stated that there was snow in defendant's yard. "These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection." *Janson v Sajewski Funeral Home Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010). Indeed, having parked in front of the driveway because he had to assess the situation, plaintiff perceived the dangers of walking in the driveway. He decided that he would not be able to get his truck up the driveway because of the steepness and icy conditions. He also stated that he walked along the middle of the driveway because he saw dirt, and that he kept looking at the ground in order to try and avoid the icy patches. It is clear that plaintiff realized the potential danger. See *Mann*, 470 Mich at 329-329; *Joyce*, 249 Mich App at 238. Therefore, the trial court did not err when it determined the ice was an open and obvious hazard, and summary disposition was appropriate.

Furthermore, no special aspects existed in this case. Plaintiff argues that the condition in this case was effectively unavoidable. *Lugo*, 464 Mich at 518. Although there is some question about the existence of an alternative route along the driveway, the fact remains that plaintiff could have simply chosen not to provide service, or at the very least communicated to defendant's father that he would not be walking up the driveway. Plaintiff was under no obligation to provide service. In fact, plaintiff testified that in some cases when they can't get up the driveway, "we tell them to clear their driveway and we'll come back. It's driver discretion."

Finally, plaintiff argues that application of the open and obvious doctrine should be precluded because defendant acted in a grossly negligent manner. While plaintiff mentioned the concept of gross negligence in his response to defendant's motion for summary disposition, it was a single comment raised in context of whether special circumstances existed to remove the case from the application of the open and obvious doctrine. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, plaintiff has cited no authoritative support for his argument that gross negligence would remove the application of the open and obvious doctrine. Therefore, any claim of plain error has been abandoned. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering